Supreme Court of the United States

OCTOBER TERM, 1942.

No. 246.

CHARLES CORYELL, *et al.*,

Petitioners,

—against—

JOHN S. PHIPPS,

Respondent.

REPLY BRIEF OF PETITIONERS.

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INDEX.

PAGE

The Findings Below That the Seminole Boat Company Was Organized for a Legitimate Purpose and That the Formalities Were Observed Are Insufficient to Show Absence of Control 1

Credit Was Not Extended to Seminole Boat Company But to Phipps 2

Petitioners Did Suffer Because of the Financial Condition of Seminole Boat Company 4

Because of the Bankrupt Condition of Seminole Boat Company Hawkins and Riley, to Whom Phipps Had Delegated the Management of the Yacht "Seminole", Did Not Feel Free to Incur Necessary Expenses for Major Repairs 5

The Facts as to Dominance of Phipps Over the Seminole Boat Company Are Almost Identical With Those in *Centmont Corporation* v. *Marsch*, 68 F. (2d) 460 7

Rules Applicable to Parent and Subsidiary Corporations Apply to Cases Where the Shareholder Is An Individual 10

The Florida Cases, Although Not Involving Torts, Declare the Florida Law on the Whole Subject of Dominance of a Corporation by a Shareholder. Those Principles Are Identical With Those in the Admiralty Cases Which Do Involve Torts 11

The Concurrent Findings Below as to Negligence and the Cause of the Explosion Are Fully Supported by the Evidence 12

PAGE

Respondent Concedes That the Gasoline Tanks of the "Seminole" Could Not Be Tested Except by a Hydrostatic Test. There Is No Evidence of Any Hydrostatic Test, and Even If There Had Been Such a Test, It Would Have Been Insufficient 15

Pilkington Was Not Under Any Duty to Inspect the Engine Room of the "Seminole", Nor Did He Make Any Inspection of Her Engine Room 17

Ex Parte Tests Made After Fire 18

The Superficial Inspection of Bernard 19

Respondent's Attempt to Distinguish Petitioners' Cases on the Question of Limitation of Liability Fails 19

TABLE OF CASES CITED:

Argent, The, 1940 A. M. C. 508 22

Axiel, The (S. D. N. Y.), 33 F. Supp. 573 (C. C. A. 2), 119 F. (2d) 866 . . . . . 21*n*

Berkey v. *Third Avenue Railway Co.*, 244 N. Y. 84 . . . . 8, 9

Biscayne Realty and Ins. Co. v. *Ostend Realty Co.*, 109 Florida 8, 148 So. 560 . . . . . 2, 10

Centmont Corporation v. *Marsch*, 68 F. (2d) 460 (C. C. A. 1) 7

Flat Top Fuel Co., Inc. v. *Martin* (C. C. A. 2), 85 F. (2d) 39 21

Foard Company v. *State of Maryland*, 219 F. 827 (C. C. A. 4) 9, 11

Great Lakes Transit Corporation and James Playfair, In re (C. C. A. 6), 81 F. (2d) 441 20

PAGE

Mangan v. *Terminal Trans. System, Inc.*, 157 Misc. 627, affirmed without opinion, 247 App. Div. 853, appeal denied 272 N. Y. 676 9

New York Dock Co., In re (C. C. A. 2), 61 F. (2d) 777 ..... 20, 21

New York Trust Co. v. *Carpenter* (C. C. A. 6), 250 F. 668 9

Silverpalm, The (C. C. A. 9), 94 F. (2d) 776 20

Third Avenue Company, The v. *Keely*, 111 Florida 46. 6*n*

Watertown Paper Company, In re (C. C. A. 2), 169 F. 252 9

Willem van Driel, Sr., The (C. C. A. 4), 252 F. 35, cert. den. 248 U. S. 566 11

OTHER AUTHORITIES CITED:

Powell, Parent and Subsidiary Corporations 1, 6, 7, 10

Insulation from Liability Through Subsidiary Corporations, 39 Yale Law Review, p. 193, Douglas and Shanks 2, 11

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The Findings Below That the Seminole Boat Company Was Organized for a Legitimate Purpose and That the Formalities Were Observed Are Insufficient to Show Absence of Control.

At pages 3, 7, 9, 10 and 13 of respondent's brief, the attempt is made to show that there were concurrent findings below that the respondent Phipps did not control and dominate the Seminole Boat Company. The main reliance of respondent seems to be that both Courts found that the Seminole Boat Company was organized for a legitimate purpose, observed all the formalities, and for these reasons it should be treated as an entity free from the dominance of Mr Phipps. This is a *non sequitur*, for as is pointed out by Mr. Powell at page 19 of his book on "Parent and Subsidiary Corporations, much relied upon by respondent Phipps:

> "* * * the observance of these formalities is all of no avail when the proof as a whole shows that in the actual conduct of the business the parent corporation completely dominated the subsidiary and used it as mere creature." (Powell, "Parent and Subsidiary Corporations," p. 19).

See also *Biscayne Realty and Ins. Co. v. Ostend Realty Co.*, 109 Florida 8, at p. 22.

In an effort to show that the Seminole Boat Company was regularly engaged in business, respondent lays great emphasis on the contract with Baker, by which Baker was authorized to charter the "Seminole". Giving full weight to the Baker contract, it is significant that by its terms it ran for one year only (Exh. CC; R. vol. VI, p. 19) and that at its expiration it was apparently not renewed. Although Hawkins testified that Baker received his salary for two years, the corporation's records show that the final payment of Baker's salary thereunder was on Nov. 7, 1930 (see Check Book, Exh. AA; Ledger, Exhibit X, account headed "Wages"). For five years before the explosion no business had been done (Fdg. 3, R. 3583). Respondent says that when Phipps used the "Seminole" he chartered her. The proof is that he paid no charter hire and no charter agreement was ever made with him. All he did was that he told Hawkins or Riley that he wanted to use the yacht (R. 1915-16, 1387).

Credit Was Not Extended to Seminole Boat Company But to Phipps.

Insufficiency of capital has always been considered cogent proof of domination of the corporation by the stockholders ("Insulation from Liability Through Subsidiary Corporations", 39 Yale Law Review, p. 193, Douglas and Shanks). Respondent says that Seminole Boat Company had adequate credit and capital (Respondent's Brief, p. 14); and that because Boulevard Mortgage Company and Palm Beach Company actually extended credit to Seminole Boat Company does not show domination of Seminole Boat Company by Phipps. His own words refute him.

The bills of the Seminole Boat Company were not paid by it;[1] they were paid by Boulevard Mortgage Company and Palm Beach Company, which respondent calls "fiscal

[1] Except for the period prior to June 2, 1931, when a part of its bills were paid out of its bank account out of funds advanced to it by Boulevard Mortgage Company.

agents" of Seminole Boat Company.[2] He says: "Credit was extended to Seminole Boat Company not its stockholders" (Respondent's Brief, p. 17). But Mr. Anderson's testimony (R. 1658 *et seq.*) and the Analysis of Operation of Seminole Boat Company, Exh. 4 D, prepared by him summarizing the records of the company which are in evidence (R. 1659-61), shows that these companies were reimbursed for these expenditures by respondent Phipps and his brother, not by the Seminole Boat Company, before any entry was made on the Seminole Boat Company's books. Indeed, on this same page 17 of respondent's brief it is stated that a bill paid by the Palm Beach Company "was repaid by two Bessemer Investment Company checks from stockholders' funds". At page 19 it is stated that Boulevard Mortgage Company and Palm Beach Company extended credit to all the members of the Phipps family and corporations controlled by it and paid their bills. At page 25 of respondent's brief it is said that the reason that Hawkins and Riley felt that they could not incur substantial expenses for the Seminole Boat Company without the stockholders' authority, was because of "the financial position of the corporation." Respondent criticises us for saying in our main brief that neither of these men dared incur any major expense without obtaining Phipps's approval. We submit that respondent's own summary of the facts fully supports our statement.

Again, at pages 18 and 23 of respondent's brief it is argued that because Phipps owned only 20 per cent of the stock of the Bessemer Investment Company which controlled the Boulevard Mortgage Company and Palm Beach Company, the willingness of these two companies to extend credit to the Seminole Boat Company does not show domination by Phipps. Can respondent be so naive as to think that credit was extended to the Seminole Boat Company on its own financial standing? Certainly Hawkins,

[2] No fees, commissions, nor interest were ever charged by either of these "fiscal agents" to the Seminole Boat Company (R. 1358). It is unique to find such generosity shown by one corporation to another.

as an officer of Boulevard Mortgage Company, and Alley, as an officer of the Palm Beach Company, would not have used a cent of the money of one of these corporations for the Seminole Boat Company, which they knew was hopelessly bankrupt, unless they were assured that the money would be repaid. They knew that "the actual financial position" (Respondent's Brief, p. 22) of the Seminole Boat Company was such that advances could never be repaid by it. The Seminole Boat Company was, nevertheless, eligible to obtain advances because it was owned by members of the Phipps family (R. 1357-1359); these advances were "charged to the stockholders" (R. 1281) and billed to them (R. 1323); Boulevard Mortgage Company was "just an intermediary" in payment of expenses (R. 1324) in the same manner as when it paid the expenses of other vessels or property owned by the Phippses (R. 1369). Such advances and payments were made in the confidence that they would be repaid by the Phippses as they always had been (R. 1399-1400). It was to Phipps that the credit was extended, not to Seminole Boat Company. Hawkins testified: "I didn't think they [the Phippses] would repudiate any debts" (R. 1400).

Petitioners Did Suffer Because of the Financial Condition of Seminole Boat Company.

Respondent's repeated statement that petitioners did not suffer because of lack of credit of the Seminole Boat Company nor because Hawkins and Riley did not feel that they could incur a major expense, cannot be supported in the light of the concurrent findings below. Both Courts have found that negligence which permitted gasoline vapors to accumulate in the engine room of the "Seminole," caused the explosion which in turn caused the loss of petitioners' vessels (forty-five boats, the loss involved in this suit). They found further that this negligence consisted in permitting gasoline tanks to become leaky "with passage of time". In other words, the negligence found consisted in failing to discover leaks and to make the tanks tight. With

constantly mounting deficits, the two men (Hawkins and Riley) responsible for this state of affairs, did nothing. What is the reason for their failure to act? It is found on page 22 of respondent's brief, where he discusses the reason for Hawkins obtaining respondent Phipps's authority for the purchase of the Prig boat. They were anxious not "to increase the deficit"; they had an eye to the "financial circumstances" and "an eye to the actual financial position" (Respondent's Brief, p. 22). Obviously, the officers of this so-called "corporation" avoided spending money whenever they could. When they called in the surveyor Bernard, they obtained an insurance survey at a fee of $17.50 (R. 1430, 2237) rather than a condition survey at a fee of $235.00 and a probable cost to the owner of $2,500. (R. 2238). Respondent's witness Bernard also testified that there was no way to make an examination of the tanks, the leaky condition of which the Courts found to be the cause of the loss, because they were encased in the tank compartment (R. 2248-9). To remove a bulkhead to examine these tanks would have been expensive. To say in these circumstances that the lack of funds, the mounting deficits, had no relation to the disaster, is to ignore the findings below. Since the only place to get money was from the Phippses; since the highest bid for the boat received some months before the explosion was $5,000., and since the probable cost to the owner of a thorough examination would be at least $2,500., the leaky condition of the tanks was never discovered, and the explosion, with its disastrous results, occurred.

Because of the Bankrupt Condition of Seminole Boat Company Hawkins and Riley, to Whom Phipps Had Delegated the Management of the Yacht "Seminole", Did Not Feel Free to Incur Necessary Expenses for Major Repairs.

There are suggestions in respondent's brief that Hawkins and Riley had full authority to spend money. It is not stated from whom they had such authority. The empty treasury of the Seminole Boat Company, and their feelings

against incurring expenses in substantial amounts, because they had "an eye to the actual financial position", renders such authority an empty gesture even if they had it. Both Hawkins and Riley have made it entirely clear that before incurring any substantial expense they wanted Phipps's authority. In short, while nominally officers of this empty shell, Seminole Boat Company, they were acting for Phipps. They were his servants. Their negligence was Phipps's negligence.

Applying Mr. Powell's tests to the conduct of Mr. Phipps in relation to the Seminole Boat Company we have the following:

The Seminole Boat Company was financially helpless, and it could only call upon Mr. Phipps for funds when it pleased Mr. Phipps to grant them. Mr. Powell states that such circumstances are "cogent evidence that the subsidiary is a mere tool in the hands of the parent." (Powell, "Parent and Subsidiary Corporations," pp. 14-15.)

The Seminole Boat Company had no funds or means to meet its payroll or other current expenses. Mr. Phipps occupied the fortunate position of being one of the Phipps family to whom the Phipps companies extended credit (Respondent's Brief, p. 19). The current expenses were paid in Florida; salaries were paid through the New York offices of the Phipps family[3] (R. 1353-4). In such case, Mr. Powell says: "a strong case against the parent corporation is made

[3] At page 23 of his brief, respondent states that we argue that a corporation is but a personal venture when its officers have no financial interest in the Company. We made no such argument. What we did say, at page 23 of our main brief, in commenting upon *The Third Avenue Company* v. *Keely*, 111 Fla. 46, was that there was a likeness between the Seminole Boat Company and The Third Avenue Company (the Phipps company criticised in that case) in many respects, among which was that the officers in both companies had no financial interest in the company. At page 42 of its brief, respondent criticises us for citing *The Third Avenue Company* case, stating that the allegation of the bill was never proved. The respondent failed to say, however, that on February 10, 1934, after the case came back to the trial court, an order of dismissal *with prejudice* was entered on consent.

out" (Powell, "Parent and Subsidiary Corporations", page 15).

Mr. Powell points out at page 17, that where the parent corporation refers to the subsidiary as a department or division of the parent corporation, or its business is referred to as the business of the parent corporation, such circumstances have probative value to establish the fact that the subsidiary has no real independent existence. So also here, where the persons who served the Seminole Boat Company were referred to as "family representatives of the Phippses" (R. 1911, 1944, 1956) and Phipps referred to the "Seminole" as "my boat" (R. 1960; see also R. 1886), had the Seminole registered for several years at his yacht club as his own vessel (R. 89, Answer to Interrogatory (i); R. 1905-7, 1964-7) and used his own house flag on the boat (R. 346, 375), such circumstances have probative value to show dominance.

The Facts as to Dominance of Phipps Over the Seminole Boat Company Are Almost Identical With Those in Centmont Corporation v. Marsch, 68 F. (2d) 460.

The Seminole Boat Company did not conform to the usual formal requirements of a corporation. Although it did have some books and it did hold formal meetings, it conducted no business; it did not keep its own books; it had no funds of its own; for the most part it did not pay its own bills; it had no bank account for four years before the fire. In many respects the case is strikingly like *Centmont Corporation* v. *Marsch*, 68 F. (2d) 460 (C. C. A. 1), where the Court, in finding that the Southern New England Railroad Corporation was a mere instrumentality of the Central Vermont Railway Company or the Grand Trunk Railway, enumerated the following circumstances:

1. The corporate records do not show that any business was done by the directors or executive committee or stockholders of the Southern New England except to authorize or take such action as required by the laws of Massachusetts or to fill vacancies in office.

2. The claim of the Central Vermont is made up from its charge on its books to the Southern New England and not from any notes or other acknowledgements of indebtedness by the Southern New England, except as the same accountants made debit or credit charges on both sets of books.[4]

3. While two sets of books were kept, they were kept in St. Albans, the headquarters of the Central Vermont, and under the supervision of the chief accountant of the Central Vermont.[5]

4. The balance sheets of the Southern New England do not indicate that it handled much cash, and the master's report discloses that much of the expense of construction was paid directly by the Central Vermont and charged on the books to the Southern New England.

5. The salary of the president of both companies was paid by the Central Vermont, and a certain proportion charged to the Southern New England.

All of these practices, which the Court found sufficient to support a finding of dominance of the Southern New England by the Central Vermont, exist in the present case but in a more aggravated form. For example, in the present case, no salaries whatever were paid to the officers of the Seminole Boat Company by that company. These men were all paid as servants of the Phipps family, and no part of their salaries was even charged to the Seminole Boat Company.

The Federal Courts have been much more ready to look through the corporate veil than have the courts of New York, yet in *Berkey v. Third Avenue Railway Co.*, 244 N. Y.

[4] There were no notes or other acknowledgements of indebtedness from Seminole Boat Company to Boulevard Mortgage Company, Palm Beach Company or to the Phippses.

[5] Before 1934 the books of the Seminole Boat Company were kept by bookkeepers in the Miami offices of the Phipps corporations. (R. 1365, 1368). After 1934 the books were kept by Anderson, the bookkeeper of the Palm Beach Company and Bessemer Properties, Inc. at Palm Beach. (R. 1658).

84, the necessity for "separate organization" as "the mark of a separate existence" was noted (244 N. Y. at p. 94). In the recent case of *Mangan v. Terminal Trans. System, Inc.*, 157 Misc. 627; affirmed without opinion, 247 App. Div. 853; appeal denied, 272 N. Y. 676, on the presentation of circumstances warranting a holding of dominance, the Court did not hesitate to hold the parent liable for negligence of the subsidiary. At page 33 of his brief, respondent seems to have come around to this view, thus abandoning the positions taken below, for he says that a shareholder "may so dominate a corporation that it becomes his instrument for whose torts he is liable".

In re Watertown Paper Company (C. C. A. 2), 169 F. 252, a decision of the Circuit Court of Appeals for the Second Circuit, was criticised by the Circuit Court of Appeals for the Sixth Circuit in *New York Trust Co. v. Carpenter* (C. C. A. 6), 250 F. 668, on the ground that control alone was insufficient to make a parent company liable for the acts of its subsidiary. It was suggested that something more was required. However, in the opinion in *New York Trust Co. v. Carpenter*, 250 F. at p. 676, the Court took pains to discuss *Foard Company v. State of Maryland*, 219 F. 827 (C. C. A. 4). After pointing out that the *Foard* case involved "negligence in admiralty" and that there was a holding that "the two corporations must be regarded *as to the outside public*, identical," it stated that the ground of the decision was that it would be unjust to hold the stevedoring company alone responsible for damage when the Foard Company, acting through the stevedoring company, was really responsible.

In the *Foard Company* case the stevedoring company was engaged in storing dynamite in a ship, and an explosion caused great damage. Here, the yacht "Seminole," which contained gasoline in tanks, was placed in a shed with a great many other boats. Gasoline vapor, which escaped because of the leaky condition of the tanks, exploded and caused great damage. Carelessness in both cases caused the loss. For identically the same reason in both cases,

there would be a grave injustice in permitting a mere shell of a corporation to prevent "innocent third persons" from regovering their losses. If owners may avoid liability by such devices, there is an easy means for every operator of dangerous instrumentalities, to immunize himself against all possibility of liability for carelessness.

Rules Applicable to Parent and Subsidiary Corporations Apply to Cases Where the Shareholder Is An Individual.

Respondent argues that what we say may be true as to the parent corporation and a subsidiary corporation, but it does not apply to the case of a person holding shares of a corporation. Mr. Powell, at Section 11 of his book, pages 37 and 38, says:

> "The rules applicable to parent and subsidiary corporations apply with equal force to cases of a person holding all or most of the capital stock of a corporation. If it is his mere instrumentality, its separate corporate entity will be disregarded and he will be held personally liable. Indeed, as a matter of practical judicial psychology, it is perhaps easier to jump the gap between corporation and stockholder in the case of a one-man corporation than in the case of a parent and a subsidiary corporation." Citing many cases. Particularly *Luckenbach S. S. Co.* v. *W. R. Grace & Co.*, 267 F. 676 (C. C. A. 4) and *Wenban Estate, Inc.* v. *Hewlett*, 193 Cal. 675.

See also *Biscayne Realty & Ins. Co.* v. *Ostend Realty Co.*, 109 Fla. 8, 148 So. 560.

The subservience of the Seminole Boat Company to Mr. Phipps was caused by the shareholders' failure to supply the corporation with sufficient means to conduct any business independently or to keep its property in good condition—even to make it possible to inspect it.

> (a) The adequacy or inadequacy of the capital and financial arrangements of the subsidiary weigh heavily in the determination of liability or non-liability of the

parent, greatly over-shadowing the other so-called indicia of identity between the companies such as common officers, directors, office and lack of separate books." ("Insulation from Liability through Subsidiary Corporations", Douglas and Shanks, Yale Law Journal, December, 1929, at p. 218).

As Thomas Deloney, "the ballating silk weaver" of the 16th Century, put it:

> "Be it better or be it worse,
> Please you the man that bears the purse."

This is all especially true when the so-called "officers" of the corporation were in the pay of the Phipps family—and not in the pay of the Seminole Boat Company.

The Florida Cases, Although Not Involving Torts, Declare the Florida Law on the Whole Subject of Dominance of a Corporation by a Shareholder. Those Principles Are Identical With Those in the Admiralty Cases Which Do Involve Torts.

Respondent Phipps at pages 41 and 42 dismisses all of the Florida cases because the rights of third parties are not involved. This circumstance does not warrant ignoring them. This cause of action arose in Florida, and the Supreme Court of Florida in each of these cases discusses the Florida law on this whole subject of liability of shareholders for the act of a subsidiary. Obviously, the applicable law is either that of Florida or the law of Admiralty. The Florida cases clearly show that if the law of Florida is to be applied, Phipps is liable. If the Admiralty law is to be applied, the same result follows. See two Admiralty cases directly in point, *The Willem van Driel, Sr.* (C. C. A. 4) 252 F. 35, cert. den. 248 U. S. 566, and *Foard Co.* v. *State of Maryland* (C. C. A. 4) 219 F. 827.

The Concurrent Findings Below as to Negligence and the Cause of the Explosion Are Fully Supported by the Evidence.

The respondent repeatedly attacks the concurrent findings below that the cause of the fire was the explosion of gasoline vapor in the engineroom (R. 3587-8), that the presence of gasoline vapor resulted from the defective and leaky condition of the gasoline tanks (R. 3588) which "with the passage of time * * * did leak" (R. 3587), and that "there is no evidence" of any "third person agency intervening which brought about the means whereby gasoline escaped with attendant fumes" (R. 3588). See Respondent's Brief, pp. 5, 6, 43, 44. Since the Circuit Court of Appeals concurred in the findings of the District Court (R. 3648) we shall not trespass upon the time of the court unduly with a discussion of evidence supporting the concurrent findings below.[6]

The tanks were of a type that would inevitably deteriorate, become defective, and leak with the passage of time and would certainly have leaked at the time of the disaster thirteen years after the original installation in the vessel (R. 842-3, 974, 1002, 3030). While the trial in the District Court was in progress, the gasoline tanks of the "Seminole" were secretly removed from the vessel and transferred to a machine shop in Miami where *ex parte* tests (referred to in Respondent's Brief, pp. 48-9) were

[6] Respondent suggests in a footnote (Resp. Brief, p. 2) that these findings by the District Court do not meet the requirements of Rule 46½ and do not have the force of findings. The same point was made in Respondent's Brief In Opposition to the Petition for Writ of Certiorari, pp. 6-7, and fully answered in the Reply Brief on Behalf of Petitioners, pp. 2-3. The District Judge said: "I find" (R. 3587) and "I am satisfied, and find" (R. 3588). Surely such expressions followed by clear statements of the matters found are a sufficient compliance with Rule 46½ and are not to be disregarded as findings merely because they do not appear in separately numbered paragraphs. In fact respondent, when it suits his purpose, refers to the statements of the District Court under the head of Discussion as "findings" (Resp. Brief, pp. 46, 47-8, 7). The Circuit Court of Appeals accepted these findings (R. 3648).

made on the tanks by respondent's representatives. When this fact appeared (R. 3162, *et seq.*), the Court directed that the case be reopened (R. 3167) and an inspection of the tanks by the District Judge in person followed (R. 3168-3171). Upon inspection, it was found that sections had been cut out of each of the tanks so that no further tests were possible (R. 3174). It also appeared that when tested *ex parte* by respondent's representatives all of the tanks leaked (R. 3173-4, 3179). Subsequently, sections from the four tanks were examined by Commander Edward Ellsberg, formerly of the United States Navy, later chief engineer in charge of construction for a large oil company, and a consulting engineer at the time he gave his testimony (R. 3464). He testified on the basis of his examinations of these sections, as follows:

> The tank is completely unsuitable as a container for gasoline, it is unsuitable in the workmanship on the plates, it is unsuitable from lack of caulking on the seams, it is unsuitable from very poor riveting, and with gasoline in this tank you could expect seeps around rivet heads and around the seams. It is the type of tank that is very evidently never designed for holding gasoline, and the type of tank which anyone who was acquainted with the difficulty of holding a penetrating liquid like gasoline in a tank would reject immediately for that service." (R. 3478-9).

He continued:

> Well, in a tank that is built for holding water, you can get away with a moderate amount of poor workmanship, and, if the tank, is not to be under pressure, with a fairly bad job, because the water leaking through around the rivets and through the seams will ultimately cause rusting on the rivets of the seams, which will give you a fair degree of tightness with water; if, however, you put gasoline in a tank, in the same tank, either before or after it has had water—if you put it in when the tank was brand new you would immediately get bad leaks immediately—but if the tank has previously been used for water so that it has had a chance to rust up around the shanks of the rivets and through the uncaulked seams, then it would hold gasoline to a moderate degree and perhaps even for a short time

well until the gasoline has cut through the rust. Any oil, and gasoline in particular, instead of rusting a metal and sealing itself up, will cut away the already existing rust and cause a leak *which will gradually increase in amount as the years go on.* Consequently, a tank to hold gasoline has got to be properly built and properly maintained, or you will have leaks in it, whereas the same kind of a tank, or even a worse built tank will hold water satisfactorily, and particularly when the tank is not under pressure. Furthermore, a small leak of water which would make no difference, because the water has no intrinsic value of its own and will do no damage, can be stood, whereas the same loss of gasoline is highly dangerous." (R. 3479). (Italics ours.)

* * * * * * * * * *

"Well, if the tank has been previously made tight because of the rusting of the rivets and the seams, what you will have, once you have put gasoline in it, and the gasoline has had a chance to work on the rust, is that it will seep through here and there in weeps and drips, and will, of course, as it runs out, evaporate. It doesn't mean, unless you had a clear hole through here, that you would have a stream of gasoline shooting out under pressure or squirting out." (R. 3480).

The tanks were evidently constructed as water tanks (R. 842, 966, 3271, 3479). They would probably have leaked before 1935 (R. 3502).

With such testimony before the court, and taking into consideration the personal inspection of the tanks by the District Judge himself,[7] there is obviously no basis for the respondent's attack on the concurrent findings of the lower courts that the tanks did become defective and leaky and did leak resulting in the presence of gasoline fumes in the engineroom, which were the proximate cause of this explosion and ensuing disaster. The fact that the District Judge in his findings specifically mentioned the fact that "a day or two after the fire, a diver found the four gasoline tank valves wide open, and the two valves on the gasoline

[7] The District Judge had also personally inspected the tanks on board the wrecked vessel as well as the entire wreck on a previous occasion in the course of the trial (R. 2330-4).

drain line opened one-third of a turn" (Fdg. 10, R. 3586), shows that the District Judge did not overlook this fact in making his finding that the defective and leaky condition of the tanks with resulting presence of gasoline fumes in the engineroom was the proximate cause of the damage done to the vessels of the libellants (R. 3587).[8]

Respondent Concedes That the Gasoline Tanks of the "Seminole" Could Not Be Tested Except By a Hydrostatic Test. There Is No Evidence of Any Hydrostatic Test, and Even If There Had Been Such a Test, It Would Have Been Insufficient.

Respondent inferentially concedes that the tanks, which were installed in the old coal bunkers were inaccessible and could not have been visually examined without tearing out a bulkhead (see Petitioners' Brief, pp. 5, 32, 38, 49), but asserts that it was not necessary to examine the tanks visually because it was a simple matter to test them hydrostatically (Respondent's Brief, p. 45). There is, however, no evidence, or even suggestion, that a hydrostatic test was ever made on the tanks in the thirteen years prior to the fire that they had been thus installed. Due to their inaccessibility and the piping arrangements, a hydrostatic test of the tanks individually or collectively would have been impractical without removing the bulkhead (R. 3151-3). Such a test would, in no event, have been of any value without thorough interior cleaning of the tanks which was impossible because of their construction (R. 3025; 1046, 1048-9; 967-8). Moreover, a hydrostatic test involving the use of water obviously would show nothing as to the tightness of the tanks against "a penetrating liquid like gasoline" (R. 3479). The importance of visual examination clearly ap-

[8] See respondent's brief, p. 44, where it is asserted that the open valves account for the presence of gasoline in the engineroom and the District Court's finding that the tanks leaked is attacked, and it is even asserted that the District Court should have held Pilkington liable as bailee in possession "because the valves were opened while the vessel was in his custody".

pears from Commander Ellsberg's description of the nature of the leak to be expected in such a tank, namely, "weeps and drips" from which the gasoline "will, of course, as it runs out, evaporate" (R. 3480).

Respondent asserts (Respondent's Brief, p. 46) that there were two systems of inspection which petitioner has ignored in charging that the respondent failed to provide for proper inspections of the "Seminole". It is asserted that Captain Baker inspected the "Seminole" and that matters of upkeep and repairs were in his charge. Baker's contract (Respondent's Exh. CC, R. Vol. 6, p. 19) expired, by its terms, one year from its date, which was October 21, 1929. After that he was paid "only when he worked on the Seminole" or "when he did anything on it" (R. 1353). Baker testified that when he was not on the payroll as master he "didn't go up there and do any work" (R. 2045, 2048). If he did, he got paid for it (R. 2045). The records of Seminole Boat Company disclose no payments to Baker after 1930 except for a short period in April-May, 1934 and again in March, 1935, when the "Seminole" was at Miami for sale, a few months before the fire (Exh. Y). There is no evidence in the record of any instructions to Baker or any delegation to Baker of any responsibility with respect to repair and construction of the "Seminole" after 1930. In fact, in April 1931 the "Seminole" was sent to Fort Lauderdale for storage (R. 1472, 1454-5, 1457) where "custody and control of the boat", as well as the duties of "control and management" and the duty "to inspect her regularly" were turned over to Mr. Riley who had "the management of the physical properties" of the Phipps family in that vicinity (R. 1480; see also Phipps, R. 1956). There is no evidence that Riley ever consulted with, or had any contact with Baker, or ever gave Baker any instructions, or relied on any inspections by Baker. The supposed system of examination by Captain Baker was non-existent.

Pilkington Was Not Under Any Duty to Inspect the Engine Room of the "Seminole", Nor Did He Make Any Inspection of Her Engine Room.

Respondent further asserts that it was Pilkington's duty, as bailee in possession, to inspect the "Seminole" and that the court below so found (Respondent's Brief, p. 46). It is further asserted by respondent's counsel that the "Seminole" had been regularly inspected by Pilkington and that Pilkington admitted that he had gone "all through" the "Seminole" five days before the fire. These statements are misleading. The fact is that when the "Seminole" was laid up at Pilkington's in April 1935, Pilkington was expressly forbidden to enter the engineroom or touch the engines. Baker testified that he told Pilkington that "I didn't want him fooling with the engines * * * I didn't want him in the engineroom" (R. 2025-6; see also R. 2047). The engineroom was of course the very place where the fatally defective conditions which caused this disaster arose. There is not one word of testimony in the record to justify the statement that the respondent or the respondent's representatives instructed Pilkington to inspect the engineroom or the engines and their appurtenances, including the tanks, or that they relied on his doing so. Moreover, in giving his testimony quoted in respondent's brief that he had gone all through the vessel on Wednesday, five days before the fire, he made it abundantly clear that he referred to parts of the vessel outside of the engineroom and that he did not and could not enter the engineroom because it was locked and he had no key (R. 460-2, 520). Pilkington did not admit, as asserted in Respondent's Brief, p. 44, that he had been in the engineroom and had tried to run the generator but, on the contrary, emphatically denied both the allegation and the assertion that he had previously made such an admission (R. 545-6).

The District Court did not find that Pilkington owed any duty to the respondent Phipps to inspect the vessel. The finding of the District Court referred to (R. 3588) was with respect to Pilkington's duties *to the libellants* to inspect

the "Seminole" and to avoid storing a dangerous vessel, such as the "Seminole", in the covered storage basin together with libellants' vessels. The libellants had alleged breach of this duty (Libel, paragraph Seventh, subdivisions 3, 4 and 5, R. 12 and 13). The District Court found that while Pilkington "owed certain duties to libellants as owners storing their vessels with him as warehouseman" and might "be criticized for not having detected and avoided the gaseous fumes on the 'Seminole' * * * I do not find that his dereliction in that regard was sufficient on which to base liability" (R. 3588). This finding is of no aid to the respondent Phipps and does not establish either discharge or delegation of respondent Phipps's duty of inspection.

Respondent's argument (Respondent's Brief, p. 49) that, since Pilkington did not discover the dangerous conditions existing in the engineroom of the "Seminole" when he went through the vessel five days before the fire, an inspection with due care would have disclosed nothing, fails, because Pilkington did not enter or inspect the engineroom where the dangerous conditions existed (R. 460-3; 519-20; 522).

Ex Parte Tests Made After Fire.

Respondent argues further that an inspection of the "Seminole" prior to the fire would not have shown that the tanks leaked asserting that "Pressure tests after the fire disclosed no leaks where the tanks had not been burned by fire" (Respondent's Brief, p. 48). The reference is to the *ex parte* tests of the tanks made by respondent's representatives during a late stage of the trial discussed *supra*, pp. 12 and 13. As a matter of fact, the tanks, when filled with water, leaked badly in the course of these tests (R. 3173-4, 3179). The tests were thereupon discontinued and the tanks mutilated so that no further test was possible (R. 3174). It is asserted that the tanks leaked only in their side seams where they had been soldered and the solder had melted off during the fire (Respondent's Brief, p. 48). The tanks, in fact, were not soldered on their side seams except for a short distance and not on all of the seams (R. 3192, 3215-6,

3253, 3473, 3524-5), and the rivets in the bottom seams were not soldered (R. 3477, 3486-9, 3525-6). The soldering was at best a makeshift, improper and unsafe method of securing tightness in the tanks (R. 3488, 3490, 3526).

The argument is an attempt to reargue and attack the findings of the District Judge, made after hearing all the arguments now propounded, and personally inspecting the tanks on two different occasions, that the tanks were leaky and defective at the time of the fire. In the face of such findings, it is idle to say that a proper inspection would not have disclosed this condition.

The Superficial Inspection of Bernard.

Respondent makes repeated references to the superficial inspection of the "Seminole" by the surveyor Bernard in March 1935 (Respondent's Brief, pp. 45, 47-8). As we have pointed out in our principal brief, pp. 37-8, Bernard conceded that he was in the engineroom for only about 15 minutes (R. 2246, 2225); that he did not make a thorough examination, nor represent his examination as such (R. 2224, 2231), and that he made no examination whatever of the tanks because this was impossible under the conditions (R. 2248-9). In view of the discussion in our principal brief, it is unnecessary to burden the court with further discussion relative to Bernard's examination.

Respondent's Attempt to Distinguish Petitioners' Cases on the Question of Limitation of Liability Fails.

At pp. 49, *et seq.* of respondent's brief, an attempt is made to distinguish the various cases cited in our principal brief relative to limitation of liability on the theory that the fact situations are different. It is said that petitioner seeks to apply to a vessel laid up in dead storage "in possession of a competent bailee charged with the duty of inspecting and caring for the vessel, the rules of law applicable to an owner in possession of a vessel in active operation".

Respondent's attempted distinction is utterly valueless since it appears clearly that the bailee Pilkington was not "charged with the duty of inspecting" the engineroom of the "Seminole", where the dangerous conditions arose, but on the contrary had been ordered to stay out of the engineroom (R. 2047).

Respondent's brief, pp. 53, *et seq.*, asserts that there can be no *alter ego* for an individual vessel owner in the matter of privity or knowledge. The cases do not support this assertion. The authorities are the other way.

The Circuit Court of Appeals for the Ninth Circuit in its decision in the case of *The Silverpalm* (C. C. A. 9), 94 F. (2d) 776, 780, did not recognize any such distinction. It held that in proceedings for limitation of liability the owner "may not escape liability by giving the managerial functions to an employed person as its agent *whether the person be corporate or otherwise*", and that in either case such an agent is the owner's "*alter ego*".

The Circuit Court of Appeals for the Sixth Circuit in its decision in the case of *In re Great Lakes Transit Corporation and James Playfair* (C. C. A. 6), 81 F. (2d) 441, applied this principle to an individual owner. The Court held that Playfair could not limit his liability because it imputed to Playfair the failure of his superintendent to discover a fault in the vessel which he could have discovered by the exercise of ordinary care.

In respondent's brief (p. 58), it is said that this decision was dictum because the Court also expressed the view that Playfair was deprived of limitation of liability because of breach of a warranty of seaworthiness in a contract which it considered personal. It might equally be said that this part of the decision was dictum, but it is fairer to say that there were two separate and distinct grounds for the decision of the Court.

Respondent's counsel says that the Circuit Court of Appeals for the Second Circuit in its decision in *In re*

New York Dock Co. (C. C. A. 2), 61 F. (2d) 777, overlooked the fact that the owner was an individual and applied the corporate rule by mistake and that the court later applied the correct rule applicable to individual owners in the case of *Flat Top Fuel Co., Inc.* v. *Martin* (C. C. A. 2), 85 F. (2d) 39 (Respondent's Brief, p. 59). The distinction between the two cases, however, is clear. In the first case, the Court held that "*the scope of authority delegated* to Heyer by Converse *was so broad* that his privity and knowledge as to the unseaworthiness was in law that of Converse" (61 F. (2d) 779).

In *Flat Top Fuel Co.* case there had been no such broad delegation of managerial powers and duties by Martin to his subordinate. Martin had retained his managerial duties and responsibilities and had merely instructed a competent master to look after the vessel in the course of her active operation and report any needed repairs. The master failed to detect an obscure defect at the inception of a particular voyage. Although this was negligence, the owner was, nevertheless, allowed to limit since the negligence was that of a competent employee within the limited scope of his duties.

In the present case, as in *In re New York Dock Co.*, *supra*, the respondent Phipps in the language of the Circuit Court of Appeals below, had imposed on his delegees "full duties as to inspection and maintenance" (R. 3649). Phipps retained no managerial duties or functions. As the court said in *In re New York Dock Co.*, *supra*:

> "The scope of authority delegated * * * was so broad" as to make the privity of those to whom he delegated so broad an authority, his own.[9]

[9] In the case of *The Ariel* (S. D. N. Y.), 33 F. Supp. 573, cited in respondent's brief, page 59, the District Court held that the vessel was not unseaworthy and that there was no liability on the part of the *corporate* owner. The court's remarks relative to limitation of liability were, therefore, quite irrelevant. The Circuit Court of Appeals in affirming the decree, *The Ariel* (C. C. A. 2), 119 F. (2d) 866, 868, ignored them.

Principle, as well as authority, requires the result that when a vessel owner completely delegates all his functions, duties and responsibilities in respect of his vessel to another, that other should be held to be his *alter ego* and the negligence, knowledge and privity of that other, the negligence, knowledge and privity of the owner; otherwise a vessel owner could in all cases divest himself of any personal responsibility and assure himself of limitation of liability in all cases. To use the pungent language of Judge Hough in the case of *The Argent*, 1940 A. M. C. 508, at page 509—

> "If lack of actual knowledge were enough, imbecility, real or assumed, on the part of the owners, would be at a premium."

Nothing contrary to this view will be found upon analysis of the decisions cited by the respondent (Respondent's Brief, p. 56). To say that the adoption of this view "would destroy the limitation statutes as fully as if Congress repealed them", or that "on petitioners' theory an individual can never limit his liability" (Respondent's Brief, p. 61) is clearly not accurate and the assertion scarcely deserves notice.

Respectfully submitted,

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